No. 80-660

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

SILVER SPUR CASINO,
Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD, *and*
HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION,
LOCAL 86, HOTEL & RESTAURANT EMPLOYEES & BARTENDERS
INTERNATIONAL UNION, AFL-CIO,
Respondents

And Related Cases

Supreme Court, U.S.
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT UNION'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board abused its discretion in holding that the presumption of majority status, derived from petitioners' voluntary recognition of the Union as the representative of their own employees, could not be defeated by petitioners' subsequent withdrawal from a multi-employer bargaining unit?

2. Whether the Board's finding that petitioners had not established a reasonably grounded doubt of the Union's majority status was supported by substantial evidence?

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RESPONDENT UNION'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1-27) is reported 623 F.2d 571. The decisions and orders of the National Labor Relations Board are reported at 228 N.L.R.B. 1147 (Silver Spur Casino); 229 N.L.R.B. (Nevada Club, Inc.); and 229 N.L.R.B. 1128 (Finally, Inc. dba Palace Club).

JURISDICTION

The judgment of the Court of Appeals relating to these petitioners was entered on July 14, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This respondent was not served with a copy of the petition until October 27, 1980.

STATUTE INVOLVED

1. Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a), provides in relevant part:

> "It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 • • •;
>
> • • • • •
>
> (5) to refuse to bargain collectively with the representatives of his employees • •."

2. Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), provides in relevant part:

> "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board • • • shall have power to issue and cause to be served upon such person a complaint stating the charges • • • and containing a notice of hearing • • •: *Provided*, that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge • • •."

STATEMENT OF THE CASE

The Brief For the National Labor Relations Board In Opposition herein succinctly and accurately states the case.

ARGUMENT

I

THIS PETITION REITERATES ARGUMENTS ALREADY MADE TO THIS COURT

The instant petition is nothing more than a rehash of arguments already presented to this Court in *N.L.R.B. v. Tahoe Nugget, Inc. d/b/a Jim Kelley's Tahoe Nugget* and *N.L.R.B. v. Nevada Lodge*, 584 F.2d 293 (9th Cir., 1978) *cert. denied* 442 U.S. 921, *reh. denied* 444 U.S. 887 (1979) (United States Supreme Court No. 78-1379)[1] and *Sahara-Tahoe Corporation v. N.L.R.B.*, et al., 581 F.2d 767 (9th Cir., 1978) *cert. denied* 442 U.S. 917, *reh. denied* 444 U.S. 888 (1979) (United States Supreme Court No. 78-1465). In fact, the underlying dispute in all these cases arose from the disintegration of the same multi-employer bargaining unit, and the subsequent refusal of all member employers to bargain with the Union.

This Court's rationale in denying certiorari in those cases is equally applicable here. The "conflict" which petitioners seek to create did not exist when the prior petitions were considered, nor does it exist now. The court below clearly found that petitioners had failed to establish a good faith reasonable doubt to justify its refusal to bargain with the Union, and that their cumulative factual showing was defective, substandard and equivocal.[2] (Pet.

[1]These petitioners' counsel is well aware of this Court's decision in those matters. The same law firm was counsel of record in *Tahoe Nugget* and *Nevada Lodge*.

[2]In fact, petitioners' "evidence" of good faith doubt is not supported by even a gratuitous reading of the record. For example, petitioners state that "the Union through its trustee publicly stated the Union represented only 20% of the employees in the multi-employer unit." (Pet. 7) Nowhere in the record is there such evidence.

App. 8-10). None of the courts of appeal absolve petitioners from the responsibility to produce cogent, unequivocal evidence as the factual predicate for refusing to bargain with the Union.

II

THERE IS NO CONFLICT AMONG THE CIRCUITS CREATED BY THE COURT OF APPEAL'S HOLDING THAT THE PRESUMPTION OF MAJORITY STATUS APPLIES IN THIS CASE

The court below correctly recognized that petitioners' voluntary recognition of the Union as the bargaining representative of their respective bar and culinary employees gave rise to a continuing presumption of the Union's majority support among those employees. (Pet. App. 7).[3] As this Court has stated, such recognition without a Union majority would violate the Act. *International Ladies' Garment Workers' Union v. N.L.R.B.*, 366 U.S. 731, 737-739 (1961). Once established, the presumption of majority support continues throughout the term of a collective bargaining agreement and beyond, *Celanese Corp. of America*, 95 N.L.R.B. 664, 672 (1951), cited with approval in *N.L.R.B. v. Burns Security Service*, 406 U.S. 272 n.2 (1972).

On this predicate,[4] the court of appeal adopted the reasoning of *N.L.R.B. v. Tahoe Nugget, supra*, 584 F.2d 293

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[3]The court stated its reliance on *N.L.R.B. v. Tahoe Nugget, supra; N.L.R.B. v. Nevada Lodge, supra; Sahara Tahoe Corp. v. N.L.R.B., supra; N.L.R.B. v. Sierra Development Co.*, 604 F.2d 606 (9th Cir., 1979); *N.L.R.B. v. Carda Hotels*, 604 F.2d 605 (9th Cir., 1979). See also, *N.L.R.B. v. Frick Co.*, 423 F.2d 1327 (3rd Cir., 1970); *N.L.R.B. v. Cayuga Crushed Stone, Inc.*, 474 F.2d 1380, 1383 (2nd Cir., 1973).

[4]Petitioners' continued assertion that the Board adopted some "derivative" presumption flowing from the multiemployer bargain-

at 303, that the presumption subsisted following petitioners' withdrawal from the multiemployer unit:

> "When respondents joined the Association and recognized the Union, they implicitly declared their employees favored the Union. Thus, majority status can be directly inferred from the employer's own conduct; the presumption is not derived from the larger unit's majority, but originates with the employer's implicit declaration of a majority in the single employer unit. Moreover, the original factual inference is convincing: employers normally will not knowingly violate the law and union fraud is rare. Continued membership in the larger unit does nothing to negate this principle even though the larger unit becomes the appropriate one for bargaining. The original presumption subsists: withdrawal from the unit simply entails a reversion to the original unit, a unit previously determined from the employer's own conduct to favor union representation." (footnote omitted) Pet. App. 6-7.

No case cited by petitioners militates against application of the presumption in the present situation. In *N.L.R.B. v. Alvin J. Bart and Co.*, 598 F.2d 1267 (2nd Cir., 1979) (Pet. 7), the Court *adopted* the presumption of continued majority support described above, and emphasized that rebuttal of the presumption required "clear and convincing evidence of loss of Union support", more than "unfounded speculation or . . . subjective state of mind." *Id.* at 1271. In finding that the employer had presented sufficient objective evidence to rebut the presumption the court relied heavily on an anti-union petition signed by three-fourths of

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ing relationship (Pet. 18) is without foundation. There was no concatenation of presumptions applied here, only the single presumption arising from petitioners' voluntary act of recognition.

the employees in the appropriate unit. *Id.* at 1272. No such objective evidence was presented here.

W & W Steel Co. v. N.L.R.B., 599 F.2d 934 (10th Cir., 1979) (Pet. 8), a case petitioners claim is "on all fours" with the present dispute, involved a successor employer's obligation with respect to an ongoing collective bargaining relationship. The court emphasized that the "critical question" was that of the employer's status as a "successor" and its decision was founded on that status. *Id.* at 936-938. Clearly, no such issue exists here, where the petitioners' obligation to bargain with the Union resulted from their own acts of recognizing the Union as the representative of a majority of their employees when they joined the multiemployer bargaining unit.

Nor is *N.L.R.B. v. Richard W. Kaase Co.*, 346 F.2d 24 (6th Cir., 1965) (Pet. 8-9) in conflict with the Board or court's holding. As petitioners' acknowledge (Pet. 9), in *Kaase* the recognition of the Union was based upon an election of employees within a multiemployer unit rather than by voluntary recognition, as here. In the *Kaase* situation, the Union must receive a majority of votes of the participating employees of all employers in the unit to obtain representative status. Thus, the union may become majority representative even though it did not receive a majority of the employees of each individual employer member of the multiemployer unit. In the present case, the presumption was not derived from union majority in the multiemployer unit, but rather from petitioners' act of voluntarily recognizing the Union as the majority representative of their employees. Petitioners' reliance

on *Kaase* is unavailing. Certainly, no case cited by petitioners holds that the presumption of continued majority support should not be applied here: the purported "conflicts in the circuits" is imaginary.[5]

Nor can petitioners avoid application of the presumption by now claiming that the initial recognition of the Union was unlawful. (Pet. 10-11). Because petitioners' recognition of a minority union would have been an unfair labor practice occurring beyond the six-month limitation period in Section 10(b) of the Act, both the Board and the court of appeal concluded petitioners could not revive a legally defunct unfair labor practice in order to defend against a present refusal to bargain. *Local Lodge No. 1424, I.A.M. v. N.L.R.B.*, 362 US. 411, 416 (1960); *N.L.R.B. v. District 30, U.M.W.*, 422 F.2d 115, 122 (6th Cir., 1969), *cert. denied.* 398 U.S. 959 (1970).

Apart from disallowing petitioners' attack on the validity of the Union's presumption of majority support, the court of appeal also correctly recognized that the circumstances of the initial recognition could not be used to bolster petitioners' claim of subjective good faith in refusing to bargain in 1974. (Pet. 10) Even if the companies' alleged unlawful recognition were admitted to show their good faith in suddenly deciding to accord their employees a free choice of bargaining representative in 1974, the court of appeal concluded that merely subjective belief was not sufficient ground to disrupt the stability of the

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[5]The court below attributed this imaginary "conflict" in part to petitioners' refusal to read entire cases, and instead, to take quotations out of context. (Pet. App. 8 n. 7). Indeed, the cases cited by petitioners herein lend credence to that view.

bargaining relationship. (Pet. App. 7). Consistent with other courts of appeal, the court held petitioners' claimed reasonable doubt could only be sustained by objective facts showing a majority of their employees no longer desired Union representation. *N.L.R.B. v. Tahoe Nugget, supra, N.L.R.B. v. Vegas Vic, Inc.*, 546 F.2d 828, 829 (9th Cir., 1976), *cert. denied*, 434 U.S. 818 (1978); *Terrell Machine Co v. N.L.R.B.*, 427 F.2d 1088, 1090 (4th Cir., 1970), *cert. denied*, 398 U.S. 929 (1970); *Lodges 1746 & 743, I.A.M. v. N.L.R.B.*, 416 F.2d 809 (D.C. Cir., 1969), *cert. denied*, 396 U.S. 1058 (1970).

As the court stated in *N.L.R.B. v. Tahoe Nugget, supra*, 584 F.2d 293 at 300:

> "We hold the employer is free to act on the objective grounds before him, regardless of his underlying motivation. If union support is lacking, the employer's action actually furthers the cause of employee democracy by overcoming the intertia which helps maintain the status quo. Since the employer's action is not in derogation of employee rights, his subjective motivation is important only evidentially. In sum, when challenging the union majority, good faith is demonstrated if the employer is aware of the facts manifesting lack of union support and employer misconduct did not contribute to the loss of support." (footnotes omitted)

Contrary to petitioners' assertion (Pet. 11), neither of the court of appeal's grounds for excluding evidence of the claimed unlawful initial recognition conflicts with the Sixth Circuit's decision in *N.L.R.B. v. Dayton Motels, Inc.*, 474 F.2d 328 (6th Cir., 1973). In *Dayton Motels*, as

in this case, the court held that circumstances establishing an unfair labor practice at the time of initial recognition of the union could not ". . . constitute an attack on the validity of the expiring agreement or on the presumption created thereby, which attack was barred by Section 10(b) of the Act." *Id.*, 474 F.2d at 333. Consistent with the Ninth Circuit and other cases in that Circuit, it held that the employer must show both reasonable grounds for doubting the union's majority status, and good faith in asserting that doubt. *Id.*, 474 F.2d at 330; *Bally Case & Cooler, Inc. v. N.L.R.B.*, 416 F.2d 902 (6th Cir. 1969); *N.L.R.B. v. Washington Manor Inc.*, 519 F.2d 750 (6th Cir. 1975). Nevertheless, the court held, evidence of fraudulent procurement of authorization cards at the union's initial recognition was material to show the employer's subjective good faith in refusing to bargain. *Id.*, 474 F.2d at 334.

Evidence of an employer's subjective good faith could be relevant where it had already established objective grounds for doubting a union's majority status. *E.g.*, *Bally Case & Cooler, Inc. v. N.L.R.B.*, *supra*. Consistent with the decision in *N.L.R.B. v. Tahoe Nugget*, *supra*, 584 F.2d 293 at 300n. 24, since petitioners here had not established reasonable grounds for doubting the Union's majority status, their protestations of good faith were therefore immaterial, and the circumstances of initial recognition irrelevant:

> "If, but only if, the employer can show the union's majority is truly in doubt, the situation confronted is at the opposite end of the spectrum from the situation where the employer's conduct is inherently de-

> structive of employee rights. It follows that not only is proof of anti-union motivation then unnecessary, but it is immaterial to the charge. We emphasize, however, that the employer must have ample evidence in support of his doubt before we can condone this assumption of the cause of employee democracy."

The court's application of the presumption was consistent with the other circuits. Petitioners' argument is reduced to a quibble regarding the sufficiency of its evidentiary presentation which will be discussed below. Most importantly, petitioners have ignored uniform Board and court recognition that policy considerations militate in favor of the presumption in this case. The presumption facilitates attainment of the Act's underlying purpose: industrial peace. Conversely, permitting petitioners to refuse to bargain with the Union after a long bargaining relationship in pursuit of asserted but unexercised employee rights is antithetical to that goal. *Brooks v. N.L.R.B.*, 348 U.S. 96, 103 (1954); *Retired Persons Pharmacy v. N.L.R.B.*, 519 F.2d 486, 490 (2d Cir., 1975); *N.L.R.B. v. Tahoe Nugget, Inc., supra*, 584 F.2d 293, 301.

III

THE COURT OF APPEAL AND BOARD PROPERLY ASSESSED THE CUMULATIVE IMPACT OF FACTORS CLAIMED TO SUPPORT PETITIONERS' REASONABLE DOUBT

Petitioners' final contention is that the Board and court have created an irrebuttable presumption. (Pet. 21-25). This contention has no merit. Petitioner has confused the concept of "unrebuttable presumption" with its own failure to produce sufficient evidence to rebut the presumption.

The record is replete with patient consideration of petitioners' evidence by both the Board and the court.[7] Although petitioners were given every opportunity to present their evidence, the evidence was found by the court to be "ambiguous". (Pet. App. 10). This finding reflects that the decisions below were not the product of an unrebuttable presumption, but rather of petitioners' failure to produce evidence sufficient to rebut the presumption. No case or authority cited by petitioners permit them to meet their burden of proof through speculative or conjectural evidence. Their assertion of "conflicting decisions" is again unavailing.

Petitioners' argument that the court did not consider the cumulative effect of their purported objective considerations is insulting. (Pet. 6-7, 15). Even a cursory reading of the court's opinion establishes that the purported objective considerations were analyzed cumulatively and were still found to be deficient.

The court stated:

> "Whether an employer has established a good faith reasonable doubt defense is a determination that must be made initially by the Board. The Board's decision will be upheld if it is supported by substantial evidence on the record as a whole. *Sahara Tahoe Corp. v. N.L.R.B.*, 581 F.2d at 771.

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[7]Petitioners also imply that they have established certain "facts". (Pet. 17-18). In fact, the evidence was found to be either irrelevant or subjective in that it did not indicate how the petitioners' employees felt about continued Union representation. Petitioners' continued reliance on those factors at this date indicate their failure to come to grips with the reality that the evidence presented did not rise to a level sufficient to rebut that presumption.

> In *Tahoe Nugget* and *Sahara-Tahoe* we stressed that the evidence presented to establish reasonable good faith doubt, individually *or cumulatively*, must unequivocally indicate that union support had declined to a minority. In those cases the Board found that the employers had not established the good faith doubt defense. Some evidence was presented of employee discontent, high employee turnover rates, low union membership, financial difficulties of the union, and a vigorous union membership drive. However, after evaluating the evidence, the Board determined that the evidence introduced by the respondents was not sufficient to support a good faith reasonable doubt of the union's majority status. The evidence, standing alone *or viewed in their totality*, presented only an ambiguous inference of loss of majority support for the union. We enforced the Board's orders in those cases, determining that there was substantial evidence on the record as a whole to support the findings.
>
> The evidence presented here does not differ materially from that considered by the Board and this court in *Tahoe Nugget* and *Sahara-Tahoe*. The Board in the present cases found that the respondents failed to establish the good faith reasonable doubt defense. Substantial evidence on the record as a whole supports the findings that the evidence, individually or *cumulatively*, presents only an equivocal inference of loss of majority support for the union." (Emphasis supplied) Pet. App. 9-10

In adopting the reasoning of *Sahara Tahoe Corp. v. N.L.R.B., supra*, 581 F.2d 767, 772, the court further explained that it was rejecting petitioners' "evidence" in its *totality*. There, the court stated:

> ". . . the *cumulative* weight of all of the evidence is not enough to rebut the presumption. It is ambiguous at best and we see no reason to disturb the Board's finding that the web [of circumstances] contains not a single thread of evidence that the employees themselves had told [the Hotel] that they no longer wanted the Union to represent them. Indeed, the web contains not a single thread of evidence that reflects or even purports to reflect the sentiments of the employees themselves—any unit employee much less a majority of the unit employees—on the question of union representation. Absent such threads, the web of circumstances is like the Cheshire cat's grin—nothing behind it."

The Board also considered the cumulative effect of the evidence, and found it deficient even on that basis. (Supp. App. 13, 57, 101). Petitioners' argument is thus reduced to a claim that the Board erred in the evidentiary weight accorded each of petitioners' asserted objective considerations since similar factors, *once established*, had previously been held to justify a refusal to bargain. (Pet. 17-18). In essence, this is a confession that petitioners engaged in brinksmanship in attempting to thwart collective bargaining among its employees. As another court of appeals stated in an analogous context, ". . . one who engages in 'brinksmanship' may easily overstep and tumble into the brink." *Wausau Steel Corp. v. N.L.R.B.*, 377 F.2d 369, 372 (7th Cir., 1967). Clearly, petitioners' disagreement with the Board's findings with respect to the weight of the evidence, or factual conclusions to be drawn therefrom, does not merit review by this Court. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 490-491 (1951). Moreover, because

such an evidentiary determination turns on the totality of all the circumstances, review of the Board's findings cannot have a substantial impact on other litigants.

CONCLUSION

For all the above reasons, as well as for the reasons stated in the Brief For The National Labor Relations Board In Opposition, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,
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